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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, PETITIONERS

v.

TOURLANES PUBLISHING COMPANY, AND ROY A. OAKLEY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Postmaster General of the United States and the Solicitor of the Post Office Department, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled causes on March 29, 1956.

OPINIONS BELOW

The opinion of the Court of Appeals in the *Tourlanes* case is reported at 231 F. 2d 773, and is reproduced in the Appendix, pp. 24–26, *infra*. The unreported District Court opinion is reproduced in the Appendix, pp. 31–33, *infra*.

The opinion of the Court of Appeals in the *Oakley* case is reported at 231 F. 2d 775, and is reproduced in the Appendix, pp. 27–28, *infra*. The unreported District Court opinion is reproduced in the Appendix, pp. 34–35, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on March 29, 1956 (Appendix, pp. 28–30, *infra*). By orders of Justice Black, dated June 22 and July 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including August 25, 1956 (Appendix, pp. 35–37, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the statutory power and duty of the Post Office Department, when it has found that an enterprise is engaged in using the mails for the sale of obscenity, "to return all" mail addressed to such enterprise is limited to mail specifically related to the particular matters found to be obscene.

2. If the power to return mail addressed to vendors of obscenity is thus limited, is a Post Office Department order reaching all mail to be set aside in the absence of any showing by the enterprise of a basis for a possible limitation to mail relating to obscene material and where, absent a showing, such a limited order is impossible of formulation and enforcement?

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U. S. C. 259a, provides:

> That, upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—
>
> (a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrived directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and
>
> (b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order

of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership or association, and the Postmaster General may provide by regulation for the return to the remitters of the same named in such orders or postal notes.

STATEMENT

Respondents brought these actions to enjoin the Postmaster General and the Solicitor of the Post Office Department from enforcing Post Office Department Orders Nos. 55967 and 55986, issued pursuant to administrative determinations, made after hearings, that Tourlanes Publishing Company and the Oakley enterprises were using the mails to obtain money for obscene matter within the meaning of the Act of August 16, 1950, *supra* (which we shall refer to as 39 U. S. C. 259a). The orders direct the appropriate local postmasters to intercept mail addressed to these enterprises, stamp it "Unlawful," and return it to the senders. The orders also forbid the payment of money orders drawn to the order of Tourlanes and the Oakley enterprises and provide that the remitters are to be notified that such payments are forbidden and that the payments would be returned (Tourlanes Joint Appendix, hereinafter referred to as T. J. A., 55–56; Oakley Joint Appendix, hereinafter referred to as O. J. A., 66–67).

As to respondent Tourlanes, an administrative complaint, filed on February 15, 1955, charged a violation of 39 U. S. C. 259a in that respondent's pamphlets contained lewd and obscene photographs of nude

women.[1] Respondent denied the charge, claiming that his pamphlets were devoted to materials of interest to photographers, were free from lascivious or suggestive implications, and were of artistic merit. A hearing was held on March 23, 1955, at which copies of the pamphlets were introduced into evidence. The parties filed proposed findings of fact, conclusions of law, and supporting reasons. On May 23, 1955, the Hearing Examiner rendered his initial decision which, after describing the evidence in detail, concluded that the administrative charge was proved (T. J. A. 49–54). On appeal to the Solicitor of the Post Office Department, this decision was affirmed on August 9, 1955 (T. J. A. 54–55). On the same day, the administrative order was issued.

The administrative proceeding against the Oakley enterprises, the other respondent herein, contained a similar charge of obscenity and, in addition, charged that the Oakley enterprise was being conducted in violation of an affidavit of discontinuance executed by respondent Oakley in 1951, after a prior Post Office Department investigation (O. J. A. 51–52). Specifically, the administrative complaint charged use of the mails for selling obscene and lewd photographs of nude women and for selling lewd books. Respondent Oakley denied the charges generally and placed specific reliance on the contention that it was engaged in the business of selling to students of photography, commercial artists, painters and sculp-

[1] In the *Tourlanes* case, the administrative pleadings and exhibits are contained in the original exhibits filed with the record in this Court.

tors (O. J. A. 55). A hearing was held on April 4 and 5, 1955. After proposed findings and conclusions of law were submitted, the Hearing Examiner rendered his initial decision on June 29, 1955, in which he found the administrative charges to be proved, finding that respondent was indiscriminately selling its material to the public (O. J. A. 57–64). On appeal, the Solicitor of the Post Office Department affirmed this decision on September 15, 1955 (O. J. A. 64–65). The administrative order was issued the same day.

Both respondents filed suit in the United States District Court for the District of Columbia, seeking declaratory and equitable relief (T. J. A. 39–44; O. J. A. 39–50). Essentially, both suits made the same contentions, namely, that the administrative proceeding was not supported by substantial evidence, that the First, Fifth and Eighth Amendments to the Constitution had been violated, and that the businesses involved were dependent upon the use of the mails.[2] Cross-motions for summary judgment were made in each case. The District Court upheld the administrative finding that respondents were purveying obscene material, but determined that they were also selling certain non-obscene matter. For this

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[2] A temporary restraining order was granted to Tourlanes (T. J. A. 44–45) but denied to Oakley (O. J. A. 69). Preliminary injunctions were denied to both respondents (T. J. A. 57–61; O. J. A. 79–83). The District Judges who denied the motions for preliminary injunctions did so on the ground that the Post Office Department order was reasonable and supported by substantial evidence. Appeals taken by respondents from the denials of their motions for preliminary injunctions were subsequently dismissed as moot. App., pp. 26, 28, 29, 30, *infra*.

reason, respondents' motions were granted to the extent that the administrative order was "to be amended to cover only those publications which have been found to be obscene" (T. J. A. 66; O. J. A. 84, 89). As the basis for this directive, the judge stated (App., pp. 32–33, *infra*):

> We are guided by *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, 47–48 (D. C. Cir. 1954) cert. den. May 9, 1955, wherein the court declared:
>
> "In consequence, orders of the Postmaster General under Section 259a * * * must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible * * * is not for this court to determine."
>
> Two publications, "Studio Art" and "Photo and Body" have been declared obscene. Plaintiff has published a tax guide and an affidavit indicates that a further issue is contemplated. Plaintiff has not as yet published a vacation guide, but has expended considerable money in its preparation. Being satisfied that orders issued under 259a must be limited to unlawful activities, future lawful activities, or those not presently held unlawful, cannot be prohibited where one is engaged in both lawful and unlawful activities. Were the rule different, grave constitutional questions would be presented. As Judge Washington noted in the *Sunshine* case, *supra*:
>
> "We do not interpret Section 259a as authorizing orders which raise serious constitutional questions of this sort."

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> The Court is satisfied that there is substantial evidence in the record to support the finding that the publications in question are obscene. Since the Post Office Department's adjudication of obscenity does not appear unlawful, arbitrary, or capricious, we cannot overturn it. At the same time, the order issued by the Postmaster General is too broad and beyond the powers conferred upon him by 39 U. S. C. A. 259a. This is not a case where we can assume that *all* remittances or *all* mail are *prima facie* identified with the illegal business. See and compare *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510 (1904) and *Donaldson* v. *Read Magazine*, 333 U. S. 178 (1948). The order in this case must, therefore, be limited to its proper statutory scope * * *.

In each case, both sides appealed and the appeals were consolidated and considered together. Respondents challenged the refusal of the District Court to set aside the administrative orders in their entirety. The Post Office Department attacked the limitation imposed by the District Judge on the orders.

On March 29, 1956, the Court of Appeals affirmed the District Judge's action in both cases. The District Court's orders were construed as permitting enforcement by the Post Office Department of its orders if "appropriately modified." The court below remarked that the cases were "generally similar" to that considered in *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42, certiorari denied, 349 U. S. 921.[3] Taking

[3] The *Sunshine* opinion is set out in the Appendix, pp. 37–55, *infra*.

Tourlanes as typical, the opinion noted that the publications of that respondent included, along with the obscene material, a tax guide "and other innocuous matter." The affirmance of the District Court was then placed squarely on the authority of the *Sunshine* decision. In both cases, counsel for respondents stated before the court below that respondents' appeals would not be pressed if the District Court's order to modify the administrative order was sustained. Upon the strength of these statements, respondents' cross-appeals were dismissed without consideration of their merits.

REASONS FOR GRANTING THE WRIT

The twin decisions below, together with their progenitor of a year-and-a-half ago (*Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42, certiorari denied, 349 U. S. 921), have so drastically restricted the reach of 39 U. S. C. 259a (*supra*, pp. 3–4) that that statute, designed as a powerful weapon against the trade in obscenity, is bound to have only the puniest of impact in the future. We again present the problem to the Court because it is now indisputable, as it may not have been when we petitioned in *Sunshine*, that without review here this civil obscenity sanction will fast lose all real effectiveness.

1. The effort to obtain quick and easy money by vending lewd and obscene books and pictures is ancient business. Throughout most of the past, the vending has been local in character and, in the main, has consisted of the individual offering and sale of books and specific photographs. During the past few

decades, an important transformation has taken place in this country. Obscene and lewd materials are being sold on a mass basis, mainly by the devices of interstate trucking and by the use of the mails. The articles thus offered for sale are no longer merely individual books, pictures, and post cards, but are frequently periodicals and pamphlets produced on a mass and continuing basis.

Almost as ancient as the business of cultivating a market for obscene materials and pandering to it, are efforts, by community standards and legislative policies embodied in statutes and regulations, to prevent the dissemination and sale of such materials. The enforcement of these standards and statutes has presented at all times a difficult problem, requiring an adjustment between the valid public interest in destroying the business of obscenity and the protection of valid freedom of expression from improper censorship. Given a proper sphere for law enforcement activity—reaching and preventing the dissemination of obscene and lewd materials—it is plain that difficulties of administration have been greatly enhanced by the growth of the business described above. After a recent study, the New York legislature concluded that penal and other sanctions, customary in state legislation, "* * * were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market * * *" (Fuld, J., in *Brown* v. *Kingsley Books,* 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, 642).[4]

[4] This case is now pending before this Court, October Term, 1956, No. 107. Also pending before the Court and related to the

As we have indicated, a principal means making possible the growth of this business of vending obscene materials has been the use of the mails. The "* * * tremendous increase in the volume of obscene materials transmitted through the mails * * *" was one of the reasons assigned by the Postmaster General for seeking the legislation which became 39 U. S. C. 259a. H. Rept. 2335, 81st Cong., 2d Sess., p. 2, and S. Rept. 2179, 81st Cong., 2d Sess., p. 2.[5]

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general problem are *Butler* v. *State of Michigan*, October Term, 1956, No. 16, and *Alberts* v. *State of California*, October Term, 1956, No. 61.

[5] Prior to the enactment of 39 U. S. C. 259a in 1950, Congress had plainly expressed its condemnation of use of the mails for transmission of obscene matter. 18 U. S. C. 1461 provided criminal penalties and further declared obscene matter to be nonmailable. This sanction has proved only partially effective, particularly in the light of present conditions. In the criminal proceedings, the fines are often too small to discourage large-scale operators, and the proceedings themselves necessarily take long periods of time during which obscene mailing continues, a situation which frustrates the basic purpose of preventing the use of the mails for the distribution of such material. Cf. the opinion of Fuld, J., in *Brown* v. *Kingsley Books*, *supra*. The nonmailability sanction is easily avoided by using first class mail which is not subject to inspection by postal authorities (18 U. S. C. 1703; 18 U. S. C. 1717 (c); 39 U. S. C. 259). It should be noted that 39 U. S. C. 259a has not been interpreted by the Post Office Department as permitting the opening of first class mail. The avoidance of inspection by the use of first class mail, too expensive for normal periodicals, is within the reach of obscene pamphlets and periodicals in view of the price charged for each item.

A recent statute subjects those who distribute obscene materials in interstate commerce to a fine of $5,000 or imprisonment of not more than five years or both. Act of June 28, 1955, 69 Stat. 183, 18 U. S. C. 1465. Another recent enactment, Public Law 821, 84th Cong., 2d Sess., approved July 27, 1956, provides a statutory basis for the preliminary impounding of mail pending administrative proceedings under 39 U. S. C. 259a. See App., *infra*, pp 56–58.

39 U. S. C. 259a, *supra*, pp. 3–4, permits the Postmaster General, satisfied by evidence that a vendor of obscenity is obtaining or attempting to obtain money through the mails for his merchandise, to "* * * instruct postmasters * * * to return *all* * * * mail" [emphasis added] addressed to such vendor to the originating post office and thence to the senders, with the word "Unlawful" stamped on the mail matter. Postal money order sums payable to such a vendor would also be returned to the remitters. The statute contemplates an administrative investigation to determine whether a business or course of dealing for the purpose of selling obscenity has been established and, if such a business or course of dealing is shown to exist, an order by the Postmaster General to local postmasters to stop incoming mail to the vendor. On its face, the section envisages inquiries or hearings directed against the going concern; and "all," not merely part of, the incoming mail to that going concern is reached by the statutory language.

Under this view of the statutory purpose and meaning, the orders issued by the Post Office Department in these cases were plainly correct. Tourlanes was entering upon the business of distributing pamphlets, found after hearing to be obscene, through the mails. Similarly, Oakley was found to be repeating, after a prior affidavit of discontinuance, its use of the mails for the dissemination of obscene photographs and pamphlets. The District Court which heard the cases agreed that these administrative findings were supported by substantial

evidence (*supra*, p. 8), and the Court of Appeals did not challenge or overturn them. Both enterprises conduct their business in such fashion that only the interception of *all* incoming mail can operate as a sanction of any sort, since the incoming mail, being first class, cannot be opened by the postal authorities. Nor is either enterprise conducted in such a way that incoming mail can be identified or segregated, even assuming that all of the mail is not attributable to the condemned pamphlets. photographs and periodicals. Hence, the District Court order requiring the Post Office Department to limit its administrative orders to the particular materials found to be obscene is tantamount to a direction that *no* administrative order can be issued since none can be formulated which is restricted solely to the lewd matter. In short, no enforcement is possible even though the administrative findings of statutory violations have been made and found to be supported by substantial evidence.

This crippling result reached in the court below was based on its full acceptance of the principle of the *Sunshine* case (App., pp. 37–55, *infra*). *Sunshine* held, in the case of a periodical, that the Post Office Department's power under 39 U. S. C. 259a to intercept incoming mail was limited to mail allocable to the materials found to be obscene, *i. e.*, the past issues of the magazine. The modification in the administrative order decreed here by the District Court was apparently based on a contention, made for the first time in the District Court, that the enterprises conducted some business other than that involved in the

administrative proceeding.[6] Summary disposition of the cases was made on the basis of general statements to this effect, with the result that no sanction can be levied against the obscene materials because some of the incoming mail *may* relate to a not-yet-published "vacation guide" or a near-useless "tax guide."

It has thus become clear (as we feared at the time of our petition for certiorari in *Sunshine,* Oct. Term, 1954, No. 665, p. 13) that the *Sunshine* principle extends beyond magazines or other regularly published periodicals to all cases in which the vendor of obscenity also purports to sell some nonobscene article or material (such as the "tax guide") or solicits purchases of future "publications" not yet in printed or vendible form. It is already current practice for some dealers in indecent pictures and pamphlets to ask for remittances for periodically-issued series of lewd photographs or films and to include with each shipment a subscription form or order blank for future issues of its pictures. If the decisions below are to become law, it will likewise be easy to nullify the impact of 39 U. S. C. 259a by advertising some innocuous and useless throwaway (in addition to the

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[6] For example, Tourlanes stated that it had in preparation a "vacation manual," not yet published. Further, Tourlanes declared that it had published a "tax guide." There was no showing of the volume, if any, of its business or incoming mail attributable to this tax guide which, upon examination, seems to be a rather poor condensation of the regular instruction booklet furnished to all tax payers by the Internal Revenue Service. Finally, Tourlanes stated that other issues of its pamphlets were of such a nature as to be of more technical interest to students of photography. See T. J. A. 47–49.

real wares) or by including some such harmless "publication" in every shipment of obscene material. Under the *Sunshine-Tourlanes-Oakley* principle, as actually applied in these three cases, such a patent avoidance of the obscenity statutes would procure full immunity from 39 U. S. C. 259a. And since, after these rulings, the District of Columbia is likely to be the forum for most, if not all, future suits to outlaw orders under 39 U. S. C. 259a,[7] that statute will soon become a dead-letter if the error of the court below is not corrected.[8]

2. For these potent practical reasons, we urge again, as we contended in *Sunshine,* that Congress must have intended to empower the Post Office Department to intercept and stop "all" mail, once a finding had been made that the enterprise in question was engaged in substantial use of the mails for the dissemination of obscene and lewd materials. We think the rejection of this plain and necessary reading of 39 U. S. C. 259a stems from constitutional doubts which, on examination, can be dispelled. In our petition in *Sunshine,* October Term, 1954, No. 665, pp. 8–11, we show the virtual identity of the statute here involved

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[7] Inasmuch as the Postmaster General is a proper party to a suit for review of a Post Office Department order, the District Court of the District of Columbia is always an appropriate, and has been the principal, forum for seeking relief from such administrative orders.

[8] The District of Columbia Circuit has recently evinced a restrictive attitude toward other aspects of the regulation of obscenity sent through the mails. See *Sunshine Book Co.* v. *Summerfield,* No. 12622, decided May 31, 1956, reversing 128 F. Supp. 564 (D. C. D. C.), petition for rehearing in banc granted.

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with the long existent statute conveying similar power to the Postmaster General in dealing with fraudulent use of the mails (39 U. S. C. 259, App. pp. 55–56, *infra*); that this identical statute has been held valid against constitutional challenges of the same type which now trouble the court below. *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510; *Donaldson* v. *Read Magazine*, 333 U. S. 178, 189–191. In both these cases, this Court rejected arguments, based on constitutional grounds, which would have had the effect of limiting the statutory powers of the Postmaster General to past conduct and specific materials found to have been fraudulent. *Read Magazine* dealt with the problem of a multiple enterprise, the component parts of which were easily identifiable. In those circumstances, not here present, the Court accepted an order which reached only mail addressed to the fraudulent puzzle department, a relatively minor part of the magazine's business.[9] And the *Coyne* case, cited with approval in *Read Magazine* (333 U. S. at 190–191), squarely rejected an argument that a stop order issued by the Postmaster General must be limited to mail "obviously connected" with the prohibited enterprise. 194 U. S. at 510.[10] If the questions thus resolved by this Court are to be reexamined, we submit that that reexamination should be undertaken here.

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[9] In the *Read Magazine* case, the company expressly urged that the order, if applicable in the future, was a prior restraint. Brief for Respondents in Answer to Questions Propounded by the Court, October Term, 1947, No. 50, p. 50. In sustaining the order against this and similar contentions, this Court said that its "future effect is merely to enjoin the continuation of conduct found fraudulent." 333 U. S. at 191.

[10] "Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may in-

3. However, even if we accept the proposition that the Post Office Department's power to intercept incoming mail under 39 U. S. C. 259a is to be limited so as to reach something less than all incoming mail, the proper circumstances to justify such a limitation must exist and the modification in the administrative order should only be made on a full showing by those who, like respondents, object to barring all mail. Cf. *Donaldson* v. *Read Magazine, supra.* In other words, the Post Office Department has at least *prima facie* power to order the interception of *all* incoming mail if the required statutory finding has been made. If an enterprise is legitimately concerned with the receipt of mail relating to lawful activities, the problem should be fairly raised during the administrative hearing on a basis which would enable the Post Office Department to issue a precise order, if justified and made feasible by the cooperation of the enterprise.[11] Again, an objecting party could apply to the Post Office Department for modification of an order, upon

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clude letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. * * * where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, *prima facie* at least, all such letters are identified with such business. *A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annullment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.*" [Emphasis added.]

[11] For instance, the enterprise could adopt separate names or addresses for its lawful business, as in the *Read Magazine* case, *supra.*

an appropriate showing and a workable offer permitting separation of legitimate from illegitimate mail. Post Office Department Rules of Practice, 39 CFR (1955 ed.) 201.27. If no such showing is made before the Post Office Department, we may even assume that evidence to the same effect could be adduced in support of a request, in a judicial proceeding, for modification of an administrative order. But cf. *National Broadcasting Company* v. *United States*, 319 U. S. 190, 227.

Wherever it be done, it is our view that the burden is on those who, like respondents, contend for a modified or specific order to provide a feasible grounding for the formulation of such an order. Where, as here, there is no record based on a *bona fide* effort to fashion a proper order, and the respondents simply stand adamant that the purity of their "vacation guide," "tax manual," and "photographic guide" must free even the bulk of the mail with obscenity as its goal, the grant of a so-called modification amounts to a nullification of law enforcement unless the burden of implementing the modification is placed on the respondents. To order the Post Office Department to modify an order at peril, as both courts below have done here, is simply to provide full insulation against any enforcement—solely on the basis of, first, a mere general claim that a legitimate business, real or spurious, is included in the enterprise's affairs, and, second, a refusal to cooperate with the postal authorities in separating the good from the bad.

Within the very recent past, Congress has recognized the tremendous difficulties of effective enforce-

ment of the statute closing the mails to obscene materials, and has provided a new and extraordinary power to be exercised in a fashion which entirely supports our view as to the proper interpretation of the Post Office Department's existing statutory power. H. Rept. 2073, 84th Cong., 2d Sess., pp. 1–3; S. Rept. 2234, 84th Cong., 2d Sess., pp. 2–3. Fly-by-night vendors of obscene materials, through the use of numerous fictitious trade names, have been able to sell their wares, reap an immediate profit through incoming remittances, close, and reappear for a repetition under a different name—all this before an administrative proceeding could properly get under way, let alone reach completion. To reach this situation, pending administrative decision, the Post Office Department sought to erect, by implication from existing laws, a power to impound incoming mail. See the discussion by Justice Douglas in *Stanard* v. *Olesen,* 74 Sup. Ct. 768, 98 L. Ed. 1151. The use of this extraordinary power without supporting statute was felt to be doubtful and legislation was therefore sought and obtained. Impounding can now be ordered by a related administrative and judicial proceeding when the Postmaster General finds such action "necessary to effective enforcement" of 39 U. S. C. 259a. Public Law 821, 84th Cong., 2d Sess., approved July 27, 1956; Appendix, *infra,* pp. 56–58. If a claim is raised that part of the incoming mail is not connected with the suspect activity, a privilege is accorded to receive such mail but only after the mail has been opened and

examined at the post office of delivery and shown to be properly receivable.[12]

Certainly, those who (like respondents) have been found, *after hearing,* to be engaged in using the mails for the vending of obscenity can be given no greater right than this. By statute, "all" of their mail is subject to stop order. See *Public Clearing House* v. *Coyne, supra,* pp. 16–17; *supra,* pp. 12–13. If less than all is to be stopped, the implementing order or decree must recognize and provide a practical basis for a modification which will not, as we have shown, merely provide a total frustration of law enforcement.

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[12] Public Law 821 provides: "When, under any order herein authorized to be issued by the Postmaster General or the district court, a person's mail is detained and held by the postmaster at the office of delivery, such person shall have the right to examine said mail and receive such mail as clearly is not connected with the alleged unlawful activity." The statute derives from H. R. 9842, 84th Cong., 2d Sess. Predecessor bills (S. 8, H. R. 174, and S. 2516, all 84th Cong., 1st Sess.) did not contain the above-quoted provision. Commenting on and approving the need for the extraordinary power conveyed by the proposed legislation, the American Bar Association, by resolution dated October 22, 1955, noted the need for certain safeguards to addressees, one of which was the right to examine and receive legitimate mail. H. Rept. 2073, *supra,* pp. 5, 6. Emphasis was placed on the extraordinary and peremptory nature of the power to be exercised. Absent this specific privilege to examine, the legislation would have justified the impounding of *all* incoming mail. In view of the prevailing circumstances (summarized *supra,* p. 19), examination and receipt of legitimate mail in a fashion which would not interfere with law enforcement was deemed reasonable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
JOSEPH LANGBART,
Attorneys.

AUGUST 1956.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12884

TOURLANES PUBLISHING COMPANY, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12969

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

TOURLANES PUBLISHING COMPANY, APPELLEE

No. 13022

TOURLANES PUBLISHING COMPANY, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided March 29, 1956

Mr. Irving R. M. Panzer for appellant in Nos. 12,884 and 13,022 and appellee in No. 12,969.

Mr. William F. Becker, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Lewis Carroll,* Assistant United States Attorney, were on the brief, for appellees in Nos. 12,884 and 13,022, and appellants in No. 12,969. *Mr. Oliver Gasch,* Principal Assistant United States Attorney, also entered an appearance for appellees in No. 12,884 and appellants in No. 12,969.

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: The factual situation here presented is generally similar to that in *Summerfield* v. *Sunshine Book Co.,* 95 U. S. App. D. C. 169, 221 F. 2d 42 (1954), cert. denied, 349 U. S. 921 (1955). The publications issued by Tourlanes Publishing Co. include a tax guide and other innocuous matter, in addition to certain pamphlets or magazines which the Post Office Department found to be obscene. An order was issued by that Department, under 39 U. S. C. § 259a (1952), directing the local postmaster to refuse to deliver mail to Tourlanes. Tourlanes applied to the District Court for relief. Judge Youngdahl, relying on the *Sunshine* case, gave judgment directing that the administrative order be amended "to cover only those publications which have been found to be obscene."[1] The Government appealed from the portion of the judgment requiring modification of the order (No. 12,969 in this court). Tourlanes cross-appealed from the refusal of the court below to void the order in its entirety (No. 13,022). However, during oral argument counsel for Tourlanes

[1] We construe the order of the District Court as in effect forbidding the Post Office Department to enforce the latter's order in its present form, but allowing enforcement if it is appropriately modified. We think that was the real intent of the court's order, and the parties evidently so regarded it.

stated that he would not press before this court the points raised on his cross-appeal if the relief granted below requiring modification of the order was ultimately sustained.

On the authority of *Sunshine,* we affirm in No. 12,969 the judgment of the District Court. On the strength of the statement of counsel for Tourlanes, and in order to avoid reaching the difficult constitutional questions raised by Tourlanes' cross-appeal, we dismiss the cross-appeal without considering its merits.[2]

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12918

ROY A. OAKLEY, ET AL., APPELLANTS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12971

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

ROY A. OAKLEY, ET AL., APPELLEES

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[2] The appeal by Tourlanes from the denial of a preliminary injunction (No. 12884) has become moot and will be dismissed.

No. 13023

ROY A. OAKLEY, ET AL., APPELLANTS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided March 29, 1956

Mr. Josiah Lyman for appellants in Nos. 12,918 and 13,023, and appellees in No. 12,971.

Mr. William F. Becker, Assistant United States Attorney, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Lewis Carroll,* Assistant United States Attorney, were on the brief, for appellees in Nos. 12,918 and 13,023 and appellants in No. 12,971. *Mr. Oliver Gasch,* Principal Assistant United States Attorney, also entered an appearance for appellants in No. 12,971.

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This litigation is similar to the *Tourlanes* cases decided today. Oakley is a photographer and not a publisher. However, he sells numerous admittedly innocuous books and publications, in addition to the photographs found by the Post Office Department to be obscene. The judgment of the District Court, which was similar to its order in *Tourlanes,* will likewise be affirmed (No. 12,971). During oral argument, counsel for Oakley made the same statement concerning his cross-appeal as was made by

counsel for Tourlanes. On a like basis, the appeals by Oakley will be dismissed (Nos. 12,918 and 13,023).

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,884

JANUARY TERM, 1956

TOURLANES PUBLISHING COMPANY, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12,969

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

TOURLANES PUBLISHING COMPANY, APPELLEE

No. 13,022

TOURLANES PUBLISHING COMPANY, APPELLANT

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia.

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the portion of the judgment of the said District Court on appeal in No. 12,969 be, and the same is hereby, affirmed, and that in No. 13,022 the cross-appeal from that judgment in its entirety be, and it is hereby, dismissed.

It is further ordered by the Court that in No. 12,884 the appeal from the order of the said District Court entered August 31, 1955 denying a preliminary injunction be, and it is hereby, dismissed.

Dated: March 29, 1956.

Per Curiam.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,918

JANUARY TERM, 1956

ROY A. OAKLEY, ET AL., APPELLANTS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

No. 12,971

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

ROY A. OAKLEY, ET AL., APPELLEES

No. 13,023

ROY A. OAKLEY, ET AL., APPELLANTS

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia.

Before EDGERTON, Chief Judge, and WASHINGTON and BASTIAN, Circuit Judges.

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the portion of the judgment of the said District Court on appeal in No. 12,971 be, and the same is hereby, affirmed, and that in No. 13,023 the cross-appeal from that judgment in its entirety be, and it is hereby, dismissed.

It is further ordered by the Court that in No. 12,918 the appeal from the order of the said District Court entered September 24, 1955, denying plaintiffs' motion for a temporary restraining order be, and it is hereby, dismissed.

Dated: March 29, 1956.

Per Curiam.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3635–55

TOURLANES PUBLISHING COMPANY, PLAINTIFF

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, DEFENDANTS

(Filed November 9, 1955)

ORDER

This cause came on to be heard on defendants' motion to dismiss, or in the alternative, for summary judgment, and on plaintiff's motion for summary judgment and opposition to defendants' motion to dismiss or for summary judgment.

The Post Office Department found two of plaintiff's publications, "Studio Art" and "Photo and Body", to be obscene and directed plaintiff's local postmaster to refuse to deliver any mail addressed to plaintiff and to refuse to pay to plaintiff any money orders drawn in its favor.

The Court is satisfied that there was a proper "separation of functions" in the hearings before the Post Office Department; and that the Postmaster General is not required to give his personal attention and judgment to all decisions of his department where he has been properly authorized to delegate such functions and has in fact done so. See Reorganization Act of 1949, 63 Stat. 203.

There is no basis for the contention that a Hearing Officer must secure, or even permit, the testimony of experts in resolving an obscenity case. A determination based upon an examination of the allegedly

obscene publication, where the publication itself is put into the record and the decision is made upon the entire record of the case, is sufficient.

The charges that the Solicitor failed to consider the entire record, that he merely impressed the stamp of approval upon the Initial Decision, and that he applied a "nudity per se is obscene" test to the publication, are not substantiated by the record.

The order of the Post Office Department, issued to plaintiff's local postmaster, directs him to refuse to deliver mail to plaintiff and to refuse to pay postal money orders drawn to the order of plaintiff. Plaintiff objects to this order on the ground that it is of indefinite duration; it encompasses matters which were not specifically declared to be obscene; and it may reach mail concerning wholly legal matters. This is a serious charge, for the power to exclude material from the mails and to intercept mail addressed to a person or a business is a power "that touches basic freedoms." See *Stanard* v. *Oleson,* 74 S. Ct. 768. We are guided by *Summerfield* v. *Sunshine Book Company,* 221 F. 2d 42, 47–48 (D. C. Cir. 1954), cert. den. May 9, 1955, wherein the court declared:

> "In consequence, orders of the Postmaster General under Section 259a * * * must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible * * * is not for this court to determine."

Two publications, "Studio Art" and "Photo and Body" have been declared obscene. Plaintiff has published a tax guide and an affidavit indicates that a further issue is contemplated. Plaintiff has not as yet published a vacation guide, but has expended considerable money in its preparation. Being satis-

fied that orders issued under 259a must be limited to unlawful activities, future lawful activities, or those not presently held unlawful cannot be prohibited where one is engaged in both lawful and unlawful activities. Were the rule different, grave constitutional questions would be presented. As Judge Washington noted in the *Sunshine* case, supra:

> "We do not interpret Section 259a as authorizing orders which raise serious constitutional questions of this sort."

The Court is satisfied that there is substantial evidence in the record to support the finding that the publications in question are obscene. Since the Post Office Department's adjudication of obscenity does not appear unlawful, arbitrary, or capricious, we cannot overturn it. At the same time, the order issued by the Postmaster General is too broad and beyond the powers conferred upon him by 39 U. S. C. A. 259a. This is not a case where we can assume that *all* remittances or *all* mail are prima facie identified with the illegal business. See and compare *Public Clearing House* v. *Coyne,* 194 U. S. 497, 510, (1904) and *Donaldson* v. *Read Magazine,* 333 U. S. 178 (1948). The order in this case must, therefore, be limited to its proper statutory scope and since we believe that the obligation is upon the government, not the publisher, to frame the order, it is by the Court this 4th day of November, 1955,

Ordered that both defendants' motion to dismiss or for summary judgment, and plaintiff's motion for summary judgment are denied.

It is further ordered that the order of the Postmaster General be amended to cover only those publications which have been found to be obscene.

LUTHER W. YOUNGDAHL,
Judge.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4206–55

ROY A. OAKLEY & WOOTEN, AND OAKLEY & WOOTEN STUDIO, 114 PUBLIC SQUARE, GALLATIN, TENNESSEE, PLAINTIFFS

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, POST OFFICE DEPARTMENT, WASHINGTON, D. C., DEFENDANTS

(Filed November 9, 1955)

ORDER

This cause came on to be heard on defendants' motion to dismiss, or in the alternative, for summary judgment, and on plaintiffs' motion for summary judgment and opposition to defendants' motion to dismiss or for summary judgment.

The Post Office Department found various materials, publications and pictures to be obscene. This finding, supported by substantial evidence, is not arbitrary or capricious. The Department directed plaintiffs' local postmaster to refuse to deliver any mail addressed to plaintiffs and to refuse to pay to plaintiffs any money orders drawn in their favor. It is clear that the order encompasses material which was before the Post Office Department and not considered unlawful; mail and money orders relating to past activities of plaintiffs as to which there has been no complaint; and effectively prohibits the use of the mails to future activities of plaintiffs.

All major legal issues presented are identical with those raised and decided in *Tourlanes Publishing Company* v. *Summerfield*, Civil Action No. 3635–55, by this Court on November 4, 1955. A copy of the order in that case will be attached hereto and is made a part hereof by reference. It is by the Court this 9 day of November, 1955.

Ordered that both defendants' motion to dismiss or for summary judgment and plaintiffs' motion for summary judgment are denied.

It Is Further Ordered that the order of the Postmaster General be amended to cover only those materials, publications and photographs which have been found to be obscene.

Luther W. Youngdahl,
Judge.

SUPREME COURT OF THE UNITED STATES

No. ——

October Term, 1956

Arthur E. Summerfield, Postmaster General, and Abe McGregor Goff, Solicitor, Post Office Department, petitioner

v.

Tourlanes Publishing Company and Roy A. Oakley, et al.

Order Extending Time To File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 16th, 1956.

(S) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of June 1956.

SUPREME COURT OF THE UNITED STATES

No. ——

October Term, 1956

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, PETITIONERS

v.

TOURLANES PUBLISHING COMPANY, AND ROY A. OAKLEY, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and

the same is hereby, extended to and including August 25, 1956.

(S) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of July, 1956.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12026

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLANT

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC., AND MARGARET BROTHERTON, APPELLEES

Appeal from the United States District Court for the District of Columbia

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(Decided December 16, 1954)

Mr. Edward H. Hickey, Attorney, Department of Justice, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Stephen W. Terry,* Attorney, Department of Justice, were on the brief, for appellant. *Mr. Lewis A. Carroll,* Assistant United States Attorney, entered an appearance for appellant.

Mr. O. John Rogge for appellees. *Mr. Josiah Lyman* entered an appearance for appellees.

Mr. Edward de Grazia filed a brief on behalf of American Civil Liberties Union, as amicus curiae, urging affirmance.

Before EDGERTON, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is an appeal from a decision of the United States District Court for the District of Columbia enjoining the enforcement of two orders of the Postmaster General of the United States.[1] These orders were based on findings that appellees' publications were obscene within the meaning of 39 U. S. C. § 259a (1951).[2] They pro-

[1] Nos. 55219 and 55220, dated June 23, 1953.

[2] "§ 259a. Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things, or substances.

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

"(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, com-

vided that all mail addressed to the appellees was to be stamped "Unlawful" and returned to the senders, or, if nothing on the letters indicated the senders, forwarded to the dead letter branch of the Post Office. They further prohibited the payment of any postal money order drawn to the order of appellees, and instructed the local Postmaster to inform any remitter that payment was forbidden and that the amount thereof should be applied for and obtained by the remitter under the regulations of the Department.

The publications involved—Sunshine and Health, Solaire, Universelle de Nudisme magazine (also referred to as Sun magazine), and Natural Herald—are nudist magazines which advocate and explain nudism and the nudist mode of living. They are illustrated with photographs of nude men, women and children, singly or in groups, sometimes shown as engaged in nudist living activities, sometimes shown in posed shots. Some of the pictures show the nude subjects at a distance and some show close views. Some of the pictures show the sexual parts of their subjects. Each of the issues of the magazines submitted at the Post Office hearings, with one exception, bore on the cover a large photograph in color of a nude young woman or women. There were also one, and sometimes two, other full-page posed photographs of a nude young woman or women in each issue of the magazines.

In the Post Office proceedings the Solicitor of the Post Office Department did not charge that the text of the magazines as such was obscene; in his view

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pany, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes."

obscenity attached only to the photographs of nude men and women accompanying the text and appearing on the cover. The Hearing Examiner and the Postmaster General so found. Appellees, on the other hand, contend that without appropriate illustrations of nudist life much of the force of the text of the magazines would be lost. They say that such pictures, as used in these publications, merely illustrated and amplified the text by showing people practicing nudism in a normal and healthy environment and in the happy enjoyment of thoroughly innocent activities. According to appellees, the pictures used were the antithesis of anything suggestive or pornographic, some of the pictures were not without positive artistic merit, and all of them presented the human form "in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth." (Br. 3.)

Thereafter appellees brought proceedings in the District Court seeking to enjoin the enforcement of the order. At the hearing of the request for a preliminary injunction all parties agreed that the decision of the court on that request should be treated as a decision on appellees' prayer for a permanent injunction. At the end of the hearing the court found that the magazines taken as a whole were not likely to promote lustful feelings or excite the sexual passions and were not obscene. Accordingly, the court granted the permanent injunction requested by the appellees.

On this appeal, appellant contends that the court below incorrectly substituted its own opinion for the determination of the Postmaster General that the appellees' publications were obscene, that there was sufficient evidence of obscenity to support the determination of the Postmaster General as a proper exercise of his statutory function, that the exclusion from

the administrative hearing of expert testimony on the question of obscenity was not a denial of due process, and that neither the statute nor the Postmaster General's orders violated the First or Fifth Amendments of the Federal Constitution.

Appellees, on the other hand, contend that 39 U. S. C. § 259a does not apply to the transmission through the mails of books, magazines or other publications, but that, if it is so applicable, it was applied by the Postmaster General in the instant case in a manner which violates the First Amendment of the Constitution of the United States, in that it constitutes a prior restraint upon the freedom of the press in contravention of that Amendment, and a penalty imposed for the exercise of a right guaranteed thereunder. Appellees further contend that the Postmaster General's application of the statute was an unreasonable means, if any at all, of accomplishing the ends sought by Congress; that it was based upon a standard so vague and nebulous as to contravene the due process clause of the Fifth Amendment of the Constitution; that Section 259a was inapplicable to appellees' publications under the doctrine of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902); and that in any event the decision of the court below holding the publications of the appellees not to be obscene was correct.

We turn first to appellees' contention that Section 259a is not applicable to publications. Section 259a, in describing the forbidden class of mail, uses broadly the words "article, matter, thing, device or substance." It does not, however, refer specifically to books, pamphlets and copies of magazines. It is thus in sharp contrast to other statutes in this general field, where Congress was careful to spell out the impact of the legislation on published works and periodical

literature.[3] But the issue here involves not the magazines published by appellees as a whole, but only the pictorial illustration of their text. Such pictures may well constitute "matter" within the purview of Section 259a. The few cases in which this section has been applied by the courts point to that conclusion. In *Rouzer* v. *Fanning* (Unreported, SD. Cal. Civ. No. 138–54) the statute was applied to photographic color transparencies, and in *Door* v. *Donaldson,* 90 U. S. App. D. C. 188, 195 F. 2d 764 (1952), it was treated as including motion picture films. The conclusion that Section 259a may be applied to pictures is supported by the fact that it was patterned on Section 259 of the same Title, which permits the imposition of similar restrictions on the rendering of postal services in cases where the mails are used in furtherance of fraudulent schemes. Under that section steps have been taken to restrict indirectly the circulation of printed matter,[4] although fraud orders under that section do not appear to have been directed against the publication of magazines as such.[5]

We must therefore reject the contention that Section 259a is wholly inapplicable to the pictorial illustrations involved in this case. But we must nevertheless recognize that the power of the Post Office De-

[3] An example is the criminal statute against mailing obscene matter, 18 U. S. C. § 1461 (1951). See also 18 U. S. C. § 1462 (1951); 19 U. S. C. § 1305 (1951).

[4] See, for example, *Donaldson* v. *Read Magazine,* 333 U. S. 178 (1948); *Reilly* v. *Pinkus,* 338 U. S. 269 (1949).

[5] But cf. *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579 (1910), where the court seems to have assumed the power of the Postmaster General to exclude from mailing under postal regulations then in effect copies of a newspaper carrying an advertisement deemed fraudulent. However, an injunction against the local postmaster was granted there because the court found that the advertisement was actually not fraudulent.

partment to exclude material from the mails and to intercept mail addressed to a person or a business is a power "that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee." This warning was given by Mr. Justice Douglas in a case which recently came before him on application for a stay.[6] He went on to emphasize that "the power to impound mail should not be lightly implied," and that the exercise of that power "may as effectively close down an establishment as the sheriff himself."[7]

Should this court then construe Section 259a to authorize the issuance of orders of indefinite duration which hamper or prevent the continuance of the publication and distribution of a magazine—with a substantial and admittedly innocuous text—because its past issues have been found to contain some obscene illustrations, although none of its future issues may contain obscene matter within the meaning of the statute? In determining this question—which we think is crucial to the case—we are aided by a decision of the Supreme Court in a somewhat similar situation, arising under Section 259.

In *Donaldson* v. *Read Magazine,* 333 U. S. 178 (1948), the Postmaster General had issued a fraud

[6] *Stanard* v. *Olesen* (opinion of Douglas, Circuit Justice, 9th Cir., May 22, 1954), 74 Sup. Ct. 768, 771, 98 L. Ed., 710, 712, citing the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in *Leach* v. *Carlile*, 258 U. S. 138, 140, and in *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 417, 436, and the concurring opinion of Judge Frank in *Roth* v. *Goldman*, 172 F. 2d 788, 790 (2d Cir. 1949); *cf. Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 157–158, 160 (1946).

[7] 74 Sup. Ct. at 771.

order to prevent receipt of mail relative to a contest conducted by the defendant's magazines, and the receipt of money orders by which would-be contestants were paying fees to enter into the contest, because the advertising for the contest was deemed by him to have been false and fraudulent. The Supreme Court of the United States sustained this finding of fact. But the Postmaster General's order prohibited not only the delivery of mail and the payment of money orders made payable to the puzzle contest or the contest editor, but also the delivery of all mail addressed, and the payment of all money orders payable, to the defendant's magazines "Facts" and "Read" and their personnel. The order was not limited to the particular fraudulent contest. On this point, the Supreme Court said (333 U. S. at p. 182):

> "The order, if indefinitely enforced, might have resulted in barring delivery of mail and payment of money orders in relation to other non-fraudulent contests as well as legitimate magazine business. All of the foregoing raised questions about the validity and scope of the original order, if unmodified, which we deemed of sufficient importance to justify further argument. For that reason we set the case down for reargument, requesting parties to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it from statutory or constitutional objections." [8]

[8] The Court's order read as follows:

"This case is ordered restored to the docket for reargument. On reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings. They are requested to discuss the following:

Before reargument, however, the Postmaster General revoked his order insofar as it applied to the lawful activties of the defendant and limited his order to contest mail.[9]

While, therefore, the issue as to the validity of the Postmaster General's original order in the *Read Magazine* case was not squarely decided, the attitude of the Court indicates strongly that orders under Section 259 must be limited to those activities of a defendant which are unlawful, and that future lawful activities

"1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its editor-in-chief? If so,

"(a) Is the order within the Postmaster General's authority under 39 U. S. C. Secs. 259, 732?

"(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

"2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so,

"(a) Is the order within the Postmaster General's statutory authority?

"(b) If so, are these code provisions in conflict with the Constitution of the United States?

"3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?" (333 U. S. at p. 182.)

[9] See, also, *Hoover* v. *M'Chesney*, 81 Fed. 472 (C. C. Ky. 1897) (local postmaster's right to withhold mail limited to such mail as was clearly connected with the prohibited lottery conducted by plaintiff). But see *Public Clearing House* v. *Coyne*, 194 U. S. 497, 510 (1904), rejecting this distinction. However, these cases involve the complainant's conduct of what was solely an illegal business.

of a defendant cannot be hampered in cases where he is engaged both in lawful and in unlawful activities.[10]

This limitation upon the Postmaster General's powers would seem to apply equally to action under Section 259a. That section was enacted by Congress in 1950 upon the request of the Postmaster General, because he considered that he did not possess legislative authority to impose adequate sanctions upon persons disseminating obscene matter, although mailing it was punishable as a crime under 18 U. S. C. § 1461. The Postmaster General reported to Congress that under the then state of the law he could refuse delivery of mail to persons selling obscene articles only within the narrow confines of 39 U. S. C. § 255 (1951), that is, if addressed to a fictitious, false or assumed name or address. He could not, he said, act against an addressee operating either under his true or corporate name. On the other hand, Section 259 of Title 39 (1951), authorizing return of mail and nonpayment of money orders, was limited to addressees engaged in frauds. In asking for the passage of the bill, which later became Section 259a, the Postmaster General stated that—

> "In line with the authority vested in the Postmaster General in fraud cases by sections 259 and 732, title 39, United States Code, the

[10] In the instant case continuance of appellees' business would be hampered or restrained by the Postmaster General's order as long as it remained in force, even though appellees in fact complied in future issues of their magazines with the standards indirectly imposed by the Postmaster General. It has been suggested in an ordinary fraud case not involving a magazine that the order should be held valid because in the event of cessation of fraudulent conduct the addressee of mail could bring a further suit to enjoin continued enforcement of the order against him (*Neher* v. *Harwood*, 128 F. 2d 846 (9th Cir. 1942)). This possibility is, however, hardly an adequate protection of appellees' rights.

> proposed legislation is sought to authorize the Postmaster General to return to senders marked 'Unlawful' all mail addressed to persons, firms, corporations, companies, partnerships or associations engaged in obtaining remittances of money or property of any kind through the mails in exchange for obscene, lewd, lascivious, indecent, filthy or vile articles, matters, things, devices, or substances, and to refuse to cash money orders and postal notes in connection therewith. This legislation will not unduly broaden the powers of the Postmaster General. He already has the power to return to senders mail addressed to concerns engaged in selling obscene materials under fictitious names. The proposed legislation merely broadens his authority to cover these cases where true or corporate names are used.
>
> "It is believed that the proposed legislation submitted herewith is adequate to accomplish the purpose desired and its enactment is recommended." [11]

This legislative background suggests that the Postmaster General's powers under Section 259a are to be construed in much the same manner as his powers under the fraud section, 39 U. S. C. § 259. Clearly, the Postmaster General did not seek, and Congress did not intend to confer upon him, wider powers in regard to the prevention of dissemination of obscene matters through the mails than he possessed with regard to the prevention of the use of the mails for frauds.

In consequence, orders of the Postmaster General under Section 259a appear to be subject to the same necessary limitations as were indicated in the *Read Magazine* case. They must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible, in cases like

[11] Sen. Rep. No. 2179, 81st Cong., 2d Sess. (1950).

the present, is not for this court to determine. It may perhaps be argued that the sweeping orders here involved should be upheld—contrary to all the inferences to be drawn from the *Read Magazine* case—on the ground that from past unlawful conduct of appellees, as the Postmaster General sees it, he may conclude that such conduct will continue and that he will again have cause to find future issues of the magazines obscene.[12] But there is and can be no finding now that any particular future issue of the appellees' magazines wil be obscene and will provide a basis for the sanctions which the Postmaster General may impose under Section 259a. To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities.[13] Grave constitutional questions would then be presented. See *Donaldson* v. *Read Magazine, supra* at pp. 181–182, 189 *et seq.*; *Hannegan* v. *Esquire, Inc., supra*; *Stanard* v. *Olesen, supra* at pp. 770–771. See also *Superior Films* v. *Department of Education of Ohio,* 346 U. S. 587 (1954); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 502 (1952).

We do not interpret Section 259a as authorizing orders which raise serious constitutional questions of this sort. We cannot conclude, in the light of these

[12] There is no contention that each and every past issue of each and every magazine published by the appellees is obscene. In fact, obscenity is only predicated upon the presence of certain illustrations upon the cover of and inside the magazines, their text being admittedly unobjectionable.

[13] See *United States ex rel. Milwaukee Publishing Co.* v. *Burleson, supra* (Brandeis, J., dissenting); *Reilly* v. *Pinkus,* 338 U. S. 269, 277 (1949).

considerations, that Congress intended by the enactment of Section 259a to authorize the indefinite suppression of periodical publications because one or another issue may contain obscene material. Some day Congress may perhaps give that authorization in specific terms, with proper guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here.

Nothing in this opinion should be read to preclude the Postmaster General from taking appropriate steps to amend the orders issued against the appellees to limit them to their proper statutory scope within 39 U. S. C. § 259a, as defined in this opinion. Nothing herein is intended to prevent him from taking in the future such other action against appellees under 39 U. S. C. § 259a as may be appropriate. However, as they now stand, the orders of the Postmaster General herein are too broad and exceed the powers conferred upon him by 39 U. S. C. § 259a. It follows that the judgment of the District Court enjoining their enforcement should be affirmed.

In this view of the case, it does not become necessary to pass upon other questions raised by the appellees as to the constitutionality or applicability of this statute, as to the propriety of the Postmaster General's finding that the publications involved in his orders were obscene (see *Parmelee* v. *United States*, 72 U. S. App. D. C. 203, 113 F. 2d 729 (1940)) or the adequacy of the evidence and record upon which such a finding was based in the instant case.

Affirmed.

DANAHER, *Circuit Judge*, dissenting: I agree that 39 U. S. C. § 259a (1952) quoted in the majority opinion has applicability here. I agree that the Postmaster General's powers under that section "are to

be construed in much the same manner as his powers under the fraud section, 39 U. S. C. § 259," as the majority observes. However, I would reverse the order of the District Court, and I wish briefly to note the reasons for the position I take.

The Constitution vested in Congress the power not only to establish post offices and post roads but to regulate the entire postal system of the country, even to the exclusion from the mails of "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy * * *" *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507 (1904). More importantly and bearing directly upon the issue presented here, the Court said, at page 507, that in aid of enforcement of its public policy, Congress possesses the power to "forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception *or the dissemination among its citizens of information of a character calculated to debauch the public morality.*" [Emphasis supplied.] Again, *Id.* at 508, the Court continued: "For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked."

The majority opinion says "* * * orders of the Postmaster General under Section 259a appear to be subject to the same necessary limitations as were indicated in the *Read Magazine* case. They must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine * * *." The position thus stated seems to me to be contrary to that set forth

in the *Coyne* case in which the Supreme Court said (194 U. S. at 510):

> "Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, or having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the Postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts." [14]

[14] In *Donaldson* v. *Read Magazine*, 333 U. S. 178, 190 (1948), the Supreme Court itemized a series of statutes and commented: "All of the foregoing statutes, and others which need not be referred to specifically, emphasize a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. The governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been legally enforced by the executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric * * *." Specifically rejecting the contention that the court

Just as Congress has power to control the use of the mails for perpetration of swindling schemes, in the exercise of that same power it authorized the Post Office Department to act with reference to the exclusion from the mails of obscene matter "*upon evidence satisfactory to the Postmaster General.*" [Emphasis supplied.]

In this case the Hearing Examiner found that "the obscene and indecent character of the magazines at issue is evident from a mere inspection thereof." The Postmaster General "upon evidence satisfactory to him" determined that the material in question was "obscene by any standard recognized by the courts. Considering all whom the publications are likely to reach in their sale to the public generally, it is certain that they are erotically and lustfully stimulating and sexually provocative to the average male person viewing them." [15] Despite the Postmaster General's

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should overrule the Coyne case, *Id.* at 194, the Court continued: "None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes."

Against this background Congress enacted § 259a, the applicability of which is here involved.

[15] The findings of the Hearing Examiner disclose that the respondents "are obtaining and endeavoring to obtain remittances of money through the mails * * * and are depositing or causing to be deposited in the United States mails, information as to where, how and from whom such magazines may be obtained * * *."

Submitted as evidence were 24 issues of "Sunshine and Health," a monthly publication, from March 1951 through March 1953, 7 issues of "Sun Magazine," a bi-monthly publication, from January–February 1952 to March–April 1953, and the July 1952 issue of "Natural Herald." After reciting specific details as to the particulars in which the publications were found to be obscene, the Hearing Examiner concluded: "It is clear that the magazines

exercise of the authority vested in him, the trial judge said: "I see no limit except my own judgment in this case," (J. A. 86) and again "I just do not agree with the Postmaster General and I grant the injunction." (J. A. 89).

In *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 68 App. D. C. 319, 321, 322, 96 F. 2d 861 (D. C. Cir. 1938), *cert. denied*, 305 U. S. 624 (1938), this court applying the standard prevailing under § 259 said "In view of what has been already said, it is apparent that the question here is whether there was any reasonable basis for believing that the present contest is a lottery or 'scheme for the distribution of money * * * by * * * chance,' for if there was, the action of the Postmaster General must stand. If not, there is no statutory basis for his order, and it must fall." That was the test as announced by Chief Judge Groner and he concluded that "the law commits the initial decision to the discretion of the Postmaster General, who is authorized to act 'upon evidence satisfactory to him,' and we are powerless unless his ruling is palpably wrong." See also *Farley* v. *Simmons*, 69 App. D. C. 110, 99 F. 2d 343 (1938), *cert. denied*, 305 U. S. 651 (1938).

In *Near* v. *Minnesota*, 283 U. S. 697, 715–716 (1931), Chief Justice Hughes said: "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases * * *," and as one such he notes "On similar

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here involved are sold and distributed to all who wish to purchase them, whether they be men, women or children. The public is solicited generally and indiscriminately * * *."

grounds, the primary requirements of decency may be enforced against obscene publications."

The material here was found by the Postmaster General to be obscene. If it were open to me to pass on the exhibits, I would agree. The case is not like *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146 (1946), where, at page 158, Mr. Justice Douglas noted "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." At page 159, Mr. Justice Frankfurter, concurring, noted even the more sharply the distinction between the *Esquire* case and one like this when he pointed out "Matters that are declared nonmailable (Criminal Code § 211; 35 Stat. 1129, 36 Stat. 1139; 18 U. S. C. § 334) are of course not 'literature' within the scope of the second-class privilege."

The only officer designated to administer the will of Congress in this situation is the Postmaster General. Unless his findings are "palpably wrong," the trial court was in error in substituting its judgment for that of the officer commanded to execute the public policy pronounced by Congress. The initial decision of the Hearing Examiner makes clear that he took into account not only the facts and circumstances upon which the hearing proceeded but the law applicable thereto. Cogently, the order of the Postmaster General did likewise. In *Parmelee* v. *United States,* 72 App. D. C. 203, 211, 113 F. 2d 729 (D. C. Cir. 1940), this court said: "The determining question is, in each case, whether a publication, taken as a whole, has a libidinous effect." The Postmaster General "upon evidence satisfactory to him," applied that test and found against the publications. Judge Vinson (later Chief Justice) dissenting in that case, at page 216, cautioned: "Certainly, it seems difficult to conclude that no reasonable man could say that this book

offends the community standard and, with a District Court finding that the book with its pictures is obscene, I am unable to understand how my brethren can stand on that proposition." Of course that case involved a libel under the Tariff Act, 19 U. S. C. § 1305 (a) (1952), properly triable in the District Court. Here, the court has nothing to do with the findings of the Postmaster General unless they are "palpably wrong." Here, that most of the scores of pictures in a score or more of exhibits are obscene seems to me as plain as the figures and the parts thereof depicted.

I cannot believe that the First Amendment or any other amendment affords protection against previous restraint against publications, the pattern of which so clearly emerges from each separate issue. Thinking thus, I would have no difficulty in concluding that the government may as a matter of public policy withdraw the facilities to pander the obscenity condemned by the Congress. The enforcement of the statute has been committed to the Postmaster General. The trial judge erred in substituting his judgment for that of the duly designated officer and the order of injunction should be reversed.

Rev. Stat. Sec. 3929, as amended, 39 U. S. C. 259, provides:

> The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any

post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

Public Law 821, 84th Cong., 2d Sess., approved July 27, 1956, in part provides:

That (a) whenever the Postmaster General shall determine during proceedings before him that in the administration of the Act of August 16, 1950 (39 U. S. C. 259a), such action is necessary to the effective enforcement of such Act, he may enter an interim order directing that mail addressed to any person be held and detained by the postmaster at the post office of delivery for a period of twenty days from the effective date of such order. Notice of such order, advising such person of the holding and detention and setting forth in specific detail the reasons therefor, together with a copy of this Act, and the aforesaid Act of August 16, 1950, shall be sent forthwith by registered or certified mail to such person at the post office at which such mail is to be held and detained. Any such order for the holding and detention of mail addressed to any person shall expire at the end of the twenty days after the issuance

thereof unless the Postmaster General shall file, prior to the expiration of such twenty-day period, a petition in the United States district court for the district in which the post office in which such mail is held or detained is situated, and obtain an order directing that mail addressed to such person be held and detained for such further period as the court shall determine. Notice of the filing of any such petition shall be given forthwith by the clerk of the court in which such petition is filed to such person, at the post office at which the mail is being detained (or otherwise as the clerk of the court shall determine to be appropriate), and such person shall have five days in which to appear and show cause why such order should not issue. If, upon all the evidence before it, the court shall determine that the continued withholding and detention of mail addressed to such person is reasonable and necessary to the effective enforcement of the Act of August 16, 1950, it shall forthwith issue an order directing that mail addressed to such person be held and detained by the postmaster at the office of delivery until conclusion of the proceeding by the Postmaster General or until further order of the court. If the court shall determine, upon all the evidence before it, that the continued withholding and detention of mail addressed to such person is not reasonable or necessary in the administration of such Act, it shall dismiss the petition and order all mail addressed to such person held or detained in any post office to be released forthwith for delivery. An appeal from the order of the court shall be allowed as in civil causes. Any order of the Postmaster General or of the district court, under this Act, may be dissolved by such court at any time for cause, including failure to conduct expeditiously the proceedings instituted against such person before the Postmaster General with respect to the Act of August 16, 1950 (39 U. S. C. 259a).

When, under any order herein authorized to be issued by the Postmaster General or the district court, a person's mail is detained and held by the postmaster at the office of delivery, such person shall have the right to examine said mail and receive such mail as clearly is not connected with the alleged unlawful activity.

* * * * *

(c) Action by the Postmaster General in issuing the interim order provided for herein and petitioning for a continuance of such order under this Act, shall not be subject to the requirements of the Administrative Procedure Act (ch. 19, title 5, U. S. C.).

U. S. GOVERNMENT PRINTING OFFICE: 1956

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 347

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, AND ABE MCGREGOR GOFF, SOLICITOR, POST OFFICE DEPARTMENT, PETITIONERS

v.

TOURLANES PUBLISHING COMPANY AND ROY A. OAKLEY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN RESPONSE TO MEMORANDUM OF COUNSEL FOR TOURLANES PUBLISHING COMPANY

Counsel for Tourlanes Publishing Company has suggested that with regard to that respondent the case is moot because Tourlanes "has gone out of business and no longer exists as an entity, either at the address listed in the order of the Post Office Department or at any other address." (Memorandum of Counsel for Tourlanes Publishing Company, p. 1).

It appears that Tourlanes has in fact gone out of business, but neither the Post Office Department nor the Department of Justice has sufficient in-

formation to determine (*a*) whether dissolution was voluntary or involuntary, or (*b*) whether the "Studio Art" and "Photo and Body" ventures (the magazines giving rise to this case) are still being conducted under another name or by other persons.

This Court frequently has recognized that in certain circumstances a case does not become moot because of the dissolution of a corporation. When petitioner "represents" the "public interest", principles are applied "in fuller measure" to avoid such a result. *Walling* v. *Reuter Co.*, 321 U. S. 671, 673–675. See also *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290. To the same effect are *Mitchell* v. *Joyce Agency Inc.*, 348 U. S. 945; *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100; and compare *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (there is a "public interest in having the legality of the practices settled").[1] Invocation of these principles is particularly apropos where, as under 39 U. S. C. 259a, the administrative agency's order is injunctive in nature (*Donaldson* v. *Read Magazine*, 333 U. S. 178, 184; *Commissioner* v. *Heininger*, 320 U. S. 467, 474). As in *Reuter*, "it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons" (321 U. S. at 674). See also the observations of Justice Douglas in

[1] See and compare the Memoranda of Petitioners in *N. L. R. B.* v. *Textile Workers Union of America, CIO, et al.*, October Term, 1956, No. 35, pp. 6–7, and *Mitchell* v. *Bekins Van & Storage Co.*, October Term, 1956, No. 122, pp. 4–5, respectively.

Standard v. *Olesen*, 74 Sup. Ct. 768, 771, 98 L. Ed. 1151, 1153 (a case under the very same statute).[2] For those reasons, in the absence of some proof by Tourlanes that the enterprise has been entirely abandoned, the Government cannot agree that the case is moot as to Tourlanes.

If, nonetheless, the Court should consider that the matter is moot as to Tourlanes, we submit that the Court should follow its established practice of granting the writ of certiorari, reversing the judgment and remanding the case for dismissal by the trial court. The "established practice of the [Supreme] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending * * * decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear Inc.*, 340 U. S. 36, 39, and the cases cited in fn. 2; see also *S. E. C.* v. *Harrison*, 340 U. S. 908; *McKay* v. *Clackamas County*, 349 U. S. 909; Stern and Gressman, *Supreme Court Practice* (2d ed.), pp. 157, 365–366.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1956.

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[2] It may not, however, be necessary to resort to the rule in the *Reuter* and related cases. Section 29 of the General Corporation Law of New York provides that the "corporate existence shall continue" after dissolution and a dissolved corporation can "sue and be sued in its corporate name." In these circumstances there is "enough life" to preclude abatement. *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, 634–635.

U. S. GOVERNMENT PRINTING OFFICE 1956

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No. 347

IN THE

Supreme Court of the United States

October Term, 1956

ARTHUR E. SUMMERFIELD, Postmaster General, and ABE MCGREGOR GOFF, Solicitor, Post Office Department, *Petitioners*

v.

TOURLANES PUBLISHING COMPANY, and ROY A. OAKLEY, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS, ROY A. OAKLEY, OAKLEY & WOOTEN, AND OAKLEY & WOOTEN STUDIO IN OPPOSITION

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IN THE

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BRIEF FOR THE RESPONDENTS, ROY A. OAKLEY, OAKLEY & WOOTEN, AND OAKLEY & WOOTEN STUDIO IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals in the *Oakley* case is reported at 231 F. 2d 775, and is reproduced in the Appendix, pp. 27-28, *infra*, to the Brief of Petitioner for Writ of Certiorari filed herein.[1] The unreported District

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[1] References to the appendix, refer to the appendix found in the back of the Brief of the petitioners, Arthur E. Summerfield, Postmaster General, and Abe McGregor Goff, Solicitor, Post Office Department v. Tourlanes Publishing Company, and Roy A. Oakley, et al., Case No. 347, filed herein for Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

Court opinion is reproduced in the Appendix, pp. 24-35, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on March 29, 1956 (Appendix, pp. 28-30, *infra*). By orders of Justice Black, dated June 22 and July 13, 1956, the time for filing a petition for a writ of certiorari was extended to and including August 25, 1956 (Appendix, pp. 35-37, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Sunshine Book case rule (*Summerfield* v. *Sunshine Book Company*, 95 U.S.A. D.C., 169, 221 F. 2d 42, cert. den. 349 U. S. 941), was properly applied by the Court below to the case at bar.

2 Whether petitioners here raise any principles of law or issues which have not been previously determined and decided by this Court against petitioners' contentions.

3. Whether the post office order of September 15, 1955, entered against respondents, should have been voided and obviated in its entirety.

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U. S. C. 259a, provides:

> That, upon evidence satisfactory to the Postmaster General that any person, firm corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is

causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrived directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the same named in such orders or pastal notes.

STATEMENT

The respondents accept the statement of the case in petitioners' petition insofar as the same applies, only, as to the respondents, Roy A. Oakley, Oakley & Wooten, and Oakley & Wooten Studio, with the followinng exception thereto and the following additions thereto.

The exception refers to that part of petitioners' statement on page 5 of their Brief in the second paragraph in

the middle of the page "in addition, charge that the Oakley enterprise was being conducted in violation of an affidavit of discontinuance executed by respondent Oakley in 1951, after a prior post office department investigation (O. J. A. 51-52)". Respondent Oakley says to that as follows: That in 1951 he was recalled to military duty in the United States Marine Corps in which he was a non-commissioned reserve officer, for service with United States forces in the Korean conflict. That said affidavit was executed either just prior to or while he was in military service in the Marine Corps in 1951; that said affidavit was extracted from respondent, Oakley, at the insistence of the Post Office Department; and with reference to the alleged post office complaint against him and his enterprise in 1951, respondent Oakley says that he never had a hearing before the Post Office Department and that none of the issues raised in the case at bar, were ever then, in 1951, or later, heard or determined by the Post Office Department administratively or by any Courts judicially. The case at bar involves the only hearing, administratively and judicially ever participated in by respondent, Oakley.

For further statement, respondent Oakley says that in the proceeding before the Post Office Department, said respondents offered testimony of a qualified witness on the question of art, photography and obscenity. This testimony was excluded by the hearinng examiner. During the administrative hearing it was determined that the testimony of qualified experts on art, photography, psychology and obscenity, would if offered, be excluded as immaterial, upon the objection from the assistant solicitor, Post Office counsel, who did object. The hearing examiner confirmed his exclusionary ruling at the hearing, and the solicitor confirmed it in his final decision. Coincident with the issuance of the final decision of the solcitor, the petitioners invoked their "mail stoppage order" of September 15, 1955, against the respondents.

It was conceded by the written opinion of the Hearing Examiner filed June 29, 1955, that at least some 35 items, all, exhibits introduced into evidence by the petitioners, Post Office Department, before the Hearing Examiner, at the administrative hearing, and alleged to have been unlawful and obscene, were actually lawful and proper items for mailing, and were not obscene nor violative of any law or statute.

ARGUMENT

Reasons for Not Granting the Writ.

1. In directing the Post Office to confine the order of September 15, 1955, issued against the respondents herein, to the materials which were before the administrative agency and found to be obscene by the hearing examiner, and none others, the lower court properly applied this court's decision in the case of *Summerfield* v. *Sunshine Book Co.*, 95 U.S.A. D.C., 169, 221 F. 2d 42, cert. den. 349 U.S. 941. In that case the identical statute under consideration here was involved. This court administered a reading of the statute which avoided constitutional issues by limiting the statute to authorization of orders relative solely to activities found to be unlawful. The same statute still obtains now as it did then, and consequently no new question or issue is involved in the case at bar.

It is difficult to comprehend the grounds on which petitioners seek to distinguish the case at bar from the *Sunshine Book* case, supra. They do not contend that the *Sunshine Book* case is wrongly decided, and they do not ask this court to overrule that decision. Petitioners seem to contend that the statute savours of different meanings and different readings in different cases. This concept of a statute having different meanings in different cases where the facts are similar would make its application and administration in accordance with law almost impossible.

In the case at bar, it is admitted that at least thirty-five of the items introduced at the administrative hearing before the Hearing Examiner by government counsel were found "not to be obscene" and were found to be proper subjects for distribution through the mails by the respondents herein.

In issuing its order against the respondents herein, the Post Office Department has proceeded as if the United States Court of Appeals for the District of Columbia Circuit, has never decided the case of *Sunshine Book Company* v. *Summerfield*, supra, and that this court did not deny certiorari, 349 U.S. 941. That case, involving an identical order under the identical statute, as involved and applied in the case at bar, did legally put an end to blanket orders of indefinite duration applying to both lawful and allegedly unlawful activities. The Court said at pp. 47 and 48:

> "In consequence, order of the Postmaster General under Section 259a . . . must be confined to materials already published and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine . . . . To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities. Grave constitutional questions then would be presented."

The order in the case at bar is not limited to the activities allegedly found by the Post Office Department to be unlawful.

The order in the case at bar applies to all mail or money orders of any type, kind, or nature whatsoever, addressed to the respondents; it thus shuts off mail and money orders applicable to past activities concerning which there was not, and has been no complaint; and it

shuts off mail and money orders relating to any and all future activities of respondents, no matter how lawful they may admittedly be in the premises. The order shuts off all mail concerning matters which the petitioners conceded, admitted, and acknowledged in the administrative hearing as being lawful. Petitioners order of September 15, 1955, shuts off from respondents, personal letters, harmless material, and communications of every sort. The Post Office Department is clearly conceding that it failed to limit its order to the matters which were before it and them, as required by law, and as announced in the *Sunshine Book* case, supra.

The dispute of the petitioners is clearly with the decision of the United States Court of Appeals for the District of Columbia Circuit, and cert. den. 349 U.S. 941, and not with respondents' business, as such. It is clearly evident that the Postmaster General does not like the *Sunshine Book* case decision, supra; that the petitioners are not reconciled to it, and will not obey it. The petitioners have not changed a single word of the standard form of their blanket order which was struck down in the *Sunshine Book* case, supra.

The case is not limited to the nature of a publication, however, and it does not even appear to be limited to publications. It appears to be directed to the distinction between lawful and unlawful activities. That is made clear from the manner in which this Court reaches its conclusion, since it derived that conclusion from *Donaldson* v. *Read Magazine*, 333 U.S. 178 (1948), a fraud order case, in which the Supreme Court's actions indicated to the Court of Appeals that Post Office orders under the fraud order statute

> "must be limited to those activities of a defendant which are unlawful, and that future lawful activities of a defendant cannot be hampered in cases where he is engaged both in lawful and in unlawful activities." 221 F. 2d at 46.

The statute involved here, 39 U.S.C. Sec. 259(a), was modeled upon and copied from the fraud order statute, and was designed to grant no wider powers, and was construed by this Court to be limited in the same manner. See *Sunshine Book Co. -. Summerfield,* supra.

The petitioners herein seek to rely heavily upon *Public Clearing House* v. *Coyne,* 194 U.S. 497 (1904), a fraud order case, for the proposition that it is constitutional to prohibit all incoming mail to a person found to have violated a statute in a single instance. Whether or not that case so holds is irrelevant here, for the United States Court of Appeals for the District of Columbia Circuit has construed 39 U.S.C. 259(a) to avoid the constitutional question, and its reasons for doing so are now immaterial. The statute must be accepted as not posing the issue. The *Coyne* case, however, is distinguishable on many grounds. It involved a person conducting what was solely an illegal business, as noted by the Court of Appeals (221 F.2d 46, footnote 9); it proceeds upon a premise which today would be unthinkable—"that the postal service is not a necessary part of the civil government" and Congress "may annex such conditions to it as it chooses" (p. 506); it intimates that there is no judicial review of the merits of the Postmaster General's decision. Subsequent judicial decisions have long made it clear that the postal service is subject to constitutional restriction to the same extent as other governmental functions.

Respondents respectfully submit that the existence of lawful activities, on their part, as found by the Hearing Examiner and as represented by their exhibits in this case, (respondents introduced into evidence at the hearing before Judge Pine on Motion for Preliminary Injunction, the 46 exhibits excluded by the Hearing Examiner, and the 35 exhibits found to be lawful and not obscene by the Hearing Examiner at the administrative hearing), and as found by the Trial Judge, Judge Youngdahl, are

a legal barrier to any order that may be issued by petitioners purporting to shut off *all* mail to respondents.

2. The petitioners here have not raised any principles of law or issues which have not been previously determined and decided by this Court against said petitioners. Petitioners' request to this Court for a writ to issue in this cause raises nothing new herein, but merely seeks to confound existing law and precedent, and the decisive and positive determination by the courts of the application of the *Statute, 39 U.S.C., 259a*, in cases such as the one at bar, against said petitioners.

The alleged standards invoked by petitioners and relied upon by them herein do not meet the Constitutional requirements in applying the statute in question here. See *Connally* v. *General Construction Company*, 269 U. S. 385, *Schecter Poultry Corp.* v. *U. S.*, 295 U. S. 495, *Lanzetta* v. *New Jersey*, 306 U. S. 451, *Winters* v. *New York*, 333 U. S. 507. Notwithstanding the long history of censorship statutes, many containing an obscenity provision, it is only since *Burstyn* v. *Wilson*, 343 U. S. 495 (1952) that this Court has come to grips with constitutional problems of censorship. Since then this court has without deviation struck down every state censorship statute before it. The case of *Holmby Productions* v. *Vaughn*, 350 U. S. 870, decided October 25, 1955, squarely involves the issue of a statute containing the word "obscene" without further elaboration. The *Holmby* case, supra, appears to be dispositive of the case at bar, for *Holmby* involved the constitutionality of a Kansas statute authorizing the prohibition of exhibitions of films found by the censorship board to be "obscene, indecent or immoral, or such as tend to debase or corrupt morals." The Supreme Court of Kansas, considering the entire phrase as synonymous with "obscene", held that these terms were sufficiently definite to satisfy constitutional requirements. The summary reversal of this attitude and determination by the highest

court in the state of Kansas, by the decision of this court, we respectfully suggest. is a view to the fate of *39 U.S.C. 259a* involved in such a case as the one at bar.

3. Respondents submit that nothing mailed by them was obscene or within the purview of the Statute, 39 U.S.C. 259a. Respondents do not and have never dealt in pornographic material, literature, or "filth", of any nature or kind.

The determination of obscenity should not be left to the views or opinions of one man in the Post Office Department regarding publications and material that come before it. We submit that in judging a publication this Court will (1) look at the publication as a whole rather than at certain parts; (2) consider the effect of the publication on the average reader, rather than on the salacious few; (3) consider whether the work under review is dirt for dirt's sake; and (4) consider whether the dirt for dirt's sake is the dominant feature of the work, so dominant that it outweighs all other merits that the work may have. *United States* v. *One Book Entitled Ulysses*, 5 F. Supp. 182 (S.D.N.Y.) aff'd 72 F. 2d 705 (C.A. 2); *United States* v. *Levine*, 83 F. 2d 156 (C.A. 2); *Parmalee* v. *United States*, 72 App. D.C. 203, 113 F. 2d 729; *Walker* v. *Popenoe*, 80 App. D. C. 129, 149 F. 2d 511.

Respondents state that if certiorari should be granted, however, in this cause, they believe that it should not be limited to the issue set out in the petition for certiorari—that is, the ruling of the Court below that the Post Office order should be confined "to cover only those publications which have been found to be obscene"—but should extend to the contentions of respondents that the order is invalid in its entirety for the following reasons:

1. The administrative finding of obscenity is based upon the erroneous position and contention that "nudity per se is obscene".

2. The testimony of an expert witness for respondents on the subjects of obscenity, art. psychology, photography, and allied subjects was erroneously and improperly excluded at the administrative hearing on the ground that all such testimony is immaterial.

3. That the proffer of evidence, testimony and exhibits showing and tending to show and reveal current standards of art and photography throughout the community and throughout the country, in books, publications and periodicals, many of them being lawfully sent through the mails and submitted at the administrative hearing (46 in number) for a comparison with materials alleged to be obscene and unlawfully sent through the mails by respondents, was improperly and erroneously denied, and such evidence, exhibits and testimony were erroneously excluded in the administrative hearing on the ground that all such testimony is immaterial.

4. The government offered no evidence or testimony at the administrative hearing as to the state of morals or decency from which the respondents' materials were thought to depart, and thus the government failed to lay a basis for a finding of obscenity.

5. The administrative order of September 15, 1955, which was signed by the Solicitor of the Post Office Department in his own name, is invalid and unlawful because the sub-delegation of power to the Solicitor to hear and decide such cases and issue such an order is invalid.

6. The application of Title 39, Sections 259(a) U.S.C., as applied to the business and enterprises of respondents, is unconstitutional, in that it deprives respondents of their property and their lawful right to do business.

7 The statute involved in unconstutional for vagueness, and as being without standards or specificity. The sole statutory criterion consists of four words contained

therein: "obscene, lewd, lascivious, and indecent". Those words do not constitute a sufficiently definite standard to advise persons or respondents here, of their rights, and to afford a basis for administrative determination.

The contentions of the respondents, Oakley, set forth above, were all raised and argued in the District Court below, and were raised, briefed and argued in the United States Court of Appeals for the District of Columbia Circuit, on a cross-appeal. At the conclusion of the oral argument in the Court of Appeals, however, counsel for Oakley stated that he would not press these contentions if the District Court order were affirmed, and the Court of Appeals thereupon affirmed the District Court order and dismissed the Oakley cross-appeal "in order to avoid reaching the difficult constitutional questions raised by Oakley's cross-appeal" (231 F. 2d 775-776, set forth and printed in the appendix to the petition for certiorari at pages 27-28).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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